
HOUSE BILL 2939

State of Washington

60th Legislature

2008 Regular Session

By Representatives Kelley, Kirby, Rodne, and McCune

Read first time 01/18/08. Referred to Committee on Insurance,
Financial Services & Consumer Protection.

1 AN ACT Relating to exchange facilitators; reenacting and amending
2 RCW 42.56.270; adding a new chapter to Title 19 RCW; creating a new
3 section; prescribing penalties; and providing an effective date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** (1) The legislature finds that presently
6 persons and entities who facilitate like-kind exchanges pursuant to
7 section 1031 of the internal revenue code and the treasury regulations
8 promulgated under that section are not monitored and licensed as
9 exchange facilitators. The purpose of this chapter is to create a law
10 that imposes safeguards ensuring that persons or entities acting as
11 qualified escrows, qualified trusts, qualified intermediaries, and
12 exchange accommodation titleholders as defined under treasury
13 regulation section 1.1031(k) through 1(g)(3) and (g)(4) and internal
14 revenue service revenue procedure 2000-37, respectively, are regulated
15 while they are acting as exchange facilitators in exchanges under
16 section 1031 of the internal revenue code.

17 (2) The legislature further finds that exchange facilitators must
18 be licensed, thereby providing taxpayers with legal recourse if the
19 exchange facilitator fails to fulfill the facilitator's material

1 contractual obligations to deliver property or funds to a taxpayer or
2 misappropriates taxpayers' funds. This chapter ensures users of
3 exchange facilitator services that their exchange facilitator has been
4 duly licensed in this state and that there are legal channels to follow
5 in the event of a material breach of contractual provisions to deliver
6 property or funds to a taxpayer or misappropriation of funds by the
7 exchange facilitator during the exchange process. This chapter also
8 requires that exchange facilitators possess a level of competency
9 defined in this chapter.

10 NEW SECTION. **Sec. 2.** The definitions in this section apply
11 throughout this chapter unless the context clearly requires otherwise.

12 (1) "Department" means the department of financial institutions.

13 (2) "Director" means the director of financial institutions.

14 (3)(a) "Exchange facilitator" means a person who:

15 (i) For a fee facilitates an exchange of like-kind property by
16 entering into an agreement with a taxpayer by which the exchange
17 facilitator acquires from the taxpayer the contractual rights to sell
18 the taxpayer's relinquished property located in this state and transfer
19 a replacement property to the taxpayer as a qualified intermediary as
20 that term is defined under treasury regulation section 1.1031(k)
21 through 1(g)(4), or enters into an agreement with a taxpayer to take
22 title to a property in this state as an exchange accommodation
23 titleholder as that term is defined in internal revenue service revenue
24 procedure 2000-37, or enters into an agreement with a taxpayer to act
25 as a qualified trustee or qualified escrow holder as those terms are
26 defined under treasury regulation section 1.1031(k) through 1(g)(3);

27 (ii) Maintains an office in this state for the purpose of
28 soliciting business as an exchange facilitator; or

29 (iii) Holds themselves out as a qualified intermediary as that term
30 is defined under treasury regulation section 1.1031(k) through 1(g)(4)
31 in any manner including but not limited to by advertising their
32 services or soliciting customers in printed publications, direct mail,
33 television or radio advertisements, telephone calls, facsimile
34 transmissions, or other electronic communications directed to the
35 general public in this state; and

36 (iv) Is not the taxpayer or disqualified person as that term is

1 defined under treasury regulation section 1.1031(k) through 1(k)
2 seeking to qualify for the nonrecognition provisions of section 1031 of
3 the internal revenue code of 1986, as amended.

4 (b) "Exchange facilitator" does not include any financial
5 institution as defined in this section or title insurer or title
6 company that is (i) merely acting as a depository for exchange funds
7 and is not facilitating exchanges or that is (ii) acting solely as a
8 qualified escrow holder or as a qualified trustee as those terms are
9 defined under treasury regulation section 1.1031(k) through (g)(3) and
10 is not otherwise facilitating an exchange.

11 (c) "Exchange facilitator" does not include advertising for and
12 teaching seminars or classes, or otherwise giving presentations to
13 attorneys, accountants, real estate professionals, tax professionals,
14 or other professionals where the primary purpose is to teach the
15 professionals about tax deferred exchanges or train them to act as
16 exchange facilitators.

17 (d) "Exchange facilitator" does not include:

18 (i)(A) A qualified intermediary as defined under treasury
19 regulation section 1.1031(k) through (g)(4) that holds exchange funds
20 from the disposition of relinquished property that is located outside
21 the state.

22 (B) The exception under (d)(i)(A) of this subsection does not apply
23 when the qualified intermediary maintains an office in this state for
24 the purpose of soliciting business as an exchange facilitator as
25 provided in (a)(ii) of this subsection.

26 (C) The exception under (d)(i)(A) of this subsection does not apply
27 when the person holds themselves out as a qualified intermediary as
28 that term is defined under treasury regulation section 1.1031(k)
29 through 1(g)(4) in any manner including but not limited to by
30 advertising their services or soliciting customers in printed
31 publications, direct mail, television or radio advertisements,
32 telephone calls, facsimile transmissions, or other electronic
33 communications directed to the general public in this state;

34 (ii) An entity that is owned entirely by a licensed exchange
35 facilitator; or

36 (iii) An entity that is owned entirely by the same persons as a
37 licensed exchange facilitator and is used by the licensee to facilitate

1 exchanges or to take title to property in this state as an exchange
2 accommodation titleholder.

3 (e) For the purposes of (a)(i) of this subsection, "fee" means
4 compensation of any nature, direct or indirect, monetary or in-kind,
5 that is received by a person or a related person as defined in section
6 267(b) or 707(b) of the internal revenue code for any services relating
7 to or incidental to the exchange of like-kind property.

8 (4) "Financial institution" means:

9 (a) Any person doing business under the laws of the state of
10 Washington or the United States, and any federally insured depository
11 institution doing business under the laws of any other state, relating
12 to commercial banks, bank holding companies, savings banks, trust
13 companies, savings and loan associations, credit unions, or real estate
14 investment trusts as defined in 26 U.S.C. Sec. 856 and the affiliates,
15 subsidiaries, and service corporations thereof; and

16 (b) Subject to the director's written approval, the exclusive
17 agents of an affiliate of a bank that is wholly owned by the bank
18 holding company that owns the bank.

19 (5) "Financial regulator" means a state or federal agency that
20 regulates financial institutions, insurance, or securities.

21 (6) "Licensee" means any person duly licensed by this state under
22 this chapter to conduct business as an exchange facilitator.

23 (7) "Person" means, in addition to the singular, persons, groups of
24 persons, cooperative associations, limited liability companies, firms,
25 partnerships, corporations, or other legal entities, and includes the
26 agents and employees of such a person.

27 (8) "Principal" or "principal stockholder" means any person who
28 controls, directly or indirectly through one or more intermediaries, or
29 alone or in concert with others, a ten percent or greater interest in
30 a licensed exchange facilitator partnership, company, association, or
31 corporation, and the owner of a sole proprietorship.

32 (9) "Publicly traded company" means a corporation whose securities
33 are publicly traded on the New York stock exchange, the American stock
34 exchange, or the national association of securities dealers automated
35 quotations tier 1, and the subsidiaries of the corporation.

36 (10) "Related company" means any cooperative associations, limited
37 liability companies, firms, partnerships, corporations, or other legal
38 entities owned by a licensee to further the licensee's business as an

1 exchange facilitator and at least ten percent in value of the
2 outstanding stock, shares, or similar certificates of ownership in the
3 related company are owned, directly or indirectly, by or for the
4 licensee.

5 (11) "Taxpayer" means the owner of property that is or is intended
6 to be exchanged for the purposes of section 1031 of the internal
7 revenue code.

8 NEW SECTION. **Sec. 3.** (1) A person, unless specifically exempted
9 from this chapter, may not engage in the business of an exchange
10 facilitator without first obtaining and maintaining a license under
11 this chapter.

12 (2) A person may not bring a suit or action for the collection of
13 compensation in connection with duties performed as an exchange
14 facilitator unless the plaintiff alleges and proves that he or she was
15 a duly licensed exchange facilitator, or exempt from the license
16 requirement of this chapter, at the time of offering to perform or
17 performing such an act or service regulated by this chapter.

18 (3) An exchange facilitator license must be prominently displayed
19 in the exchange facilitator's place of business.

20 (4) Every licensed exchange facilitator must at all times have a
21 designated exchange facilitator officer responsible for all activities
22 of the exchange facilitator in conducting the business of an exchange
23 facilitator. A designated exchange facilitator officer, principal, or
24 owner who has supervisory authority over an exchange facilitator is
25 responsible for a licensee's, employee's, or independent contractor's
26 violations of this chapter and its rules if:

27 (a) The designated exchange facilitator officer, principal, or
28 owner directs or instructs the conduct or, with knowledge of the
29 specific conduct, approves or allows the conduct; or

30 (b) The designated exchange facilitator officer, principal, or
31 owner who has supervisory authority over the licensed exchange
32 facilitator knows or by the exercise of reasonable care and inquiry
33 should have known of the conduct, at a time when its consequences can
34 be avoided or mitigated and fails to take reasonable remedial action.

35 NEW SECTION. **Sec. 4.** (1) Applications for an exchange facilitator

1 license under this chapter shall be in writing and in the form
2 prescribed by the director. The application shall contain at least the
3 following information:

4 (a) The name, address, date of birth, and social security number
5 of the applicant, and any other names, dates of birth, or social
6 security numbers previously used by the applicant, unless waived by the
7 director;

8 (b) If the applicant is a partnership or association, the name,
9 address, date of birth, and social security number of each general
10 partner or principal of the association, and any other names, dates of
11 birth, or social security numbers previously used by the members,
12 unless waived by the director;

13 (c) If the applicant is a corporation, other than a publicly traded
14 company, the name, address, date of birth, and social security number
15 of each officer, director, registered agent, and principal, and any
16 other names, dates of birth, or social security numbers previously used
17 by the officers, directors, registered agents, and principals unless
18 waived by the director;

19 (d) The name, address, date of birth, and social security number of
20 the applicant's designated exchange facilitator officer, and any other
21 names, dates of birth, or social security numbers previously used by
22 the designated exchange facilitator officer;

23 (e) A complete set of fingerprints taken by an authorized law
24 enforcement officer for each officer, director, principal, and the
25 designated exchange facilitator officer and for each person who has the
26 authority to deposit, transfer, and disburse exchange funds. The
27 fingerprint information for an officer, director, or principal is not
28 required if the corporation is a publicly traded company; and

29 (f) Other information regarding the applicant's or designated
30 exchange facilitator officer's background, financial responsibility,
31 experience, character, and general fitness as the director may require
32 by rule.

33 (2) As a part of or in connection with an application for any
34 license under this section, the applicant shall furnish information
35 concerning the identity of the designated exchange facilitator, each
36 officer that will be conducting the business of the applicant in this
37 state, and each person who has the authority to deposit, transfer, and
38 disburse exchange funds held by the applicant. This information must

1 include the fingerprints required in subsection (1)(e) of this section
2 for submission to the Washington state patrol, the federal bureau of
3 investigation, and any governmental agency or entity authorized to
4 receive this information for (a) a state and national criminal history
5 background check; (b) personal history, experience, or business record
6 purposes; and (c) other pertinent facts, as the director may reasonably
7 require. As part of or in connection with an application for a license
8 under this chapter, the director is authorized to receive criminal
9 history record information that includes nonconviction data as defined
10 in RCW 10.97.030. The department may only disseminate nonconviction
11 data obtained under this section to criminal justice agencies. This
12 section does not apply to financial institutions regulated under
13 chapters 31.12 and 31.13 RCW and Titles 30, 32, and 33 RCW or insurers
14 regulated under Title 48 RCW.

15 (3) Each applicant for an exchange facilitator's license shall:

16 (a) File and maintain a fidelity bond, in an amount of not less
17 than one million dollars executed by an insurer authorized to transact
18 that business in this state and approved by the director; or

19 (b) Deposit an amount of cash and securities or irrevocable letters
20 of credit equivalent to one million dollars under the terms and
21 conditions acceptable to the director. The deposit must be made into
22 an interest-bearing deposit or money market account of the
23 facilitator's choice and the interest earned accrues to the
24 facilitator.

25 (4) An applicant for an exchange facilitator's license shall:

26 (a) Have and maintain a policy of errors and omissions of not less
27 than five hundred thousand dollars issued by an insurer authorized to
28 transact that insurance in this state and approved by the director; or

29 (b) Deposit an amount of cash and securities or irrevocable letters
30 of credit equivalent to five hundred thousand dollars under the terms
31 and conditions acceptable to the director. The deposit must be made
32 into an interest-bearing deposit or money market account of the
33 facilitator's choice and the interest earned accrues to the
34 facilitator.

35 (5) An exchange facilitator may maintain a bond or insurance or
36 deposits in greater amounts than required in subsections (3) and (4) of
37 this section.

1 (6) If the director determines that the bonds or insurance are not
2 commercially, reasonably available, the director may waive or modify
3 the requirement for the bonds or insurance for a period of time to be
4 determined by the director. Any waiver or modification must be made by
5 rule.

6 (7) The bonds or insurance required in this section may not be
7 canceled without thirty days prior notice to the director. If the
8 licensee has approved deposits in lieu of the bond or insurance, those
9 deposits may not be withdrawn without thirty days prior notice to the
10 director. The director must suspend the license of the licensee unless
11 the licensee has secured an adequate replacement for the required
12 amount of bonds, insurance, or deposits.

13 NEW SECTION. **Sec. 5.** The director or any person claiming to have
14 sustained damage by reason of the failure of an exchange facilitator to
15 comply with this chapter, may file a claim against the exchange
16 facilitator and seek to recover damages from the bonds, insurance,
17 deposits, or letters of credit required in section 4 of this act.

18 NEW SECTION. **Sec. 6.** (1) The director shall issue and deliver an
19 exchange facilitator license to an applicant if, after investigation,
20 the director makes the following findings:

21 (a) The applicant has complied with section 5 of this act;

22 (b) Neither the applicant, any of its principals, or the designated
23 exchange facilitator have had a license issued under this chapter or
24 any similar state statute suspended or revoked within five years of the
25 filing of the present application;

26 (c) Neither the applicant, any of its principals, or the designated
27 exchange facilitator officer have been convicted of a gross misdemeanor
28 involving dishonesty or financial misconduct or a felony within seven
29 years of the filing of the present application;

30 (d) The designated exchange facilitator officer (i) is an attorney
31 or certified public accountant admitted to practice in any state or
32 territory of the United States or (ii) the designated exchange
33 facilitator officer has been actively conducting the business of
34 exchange facilitation on a full-time basis for the last three years and
35 has passed a written examination whose content is established or
36 approved by the director;

1 (e) The applicant, its principals, and the designated exchange
2 facilitator officer have demonstrated financial responsibility,
3 character, and general fitness such as to command the confidence of the
4 community and to warrant a belief that the business will be operated
5 honestly, fairly, and efficiently within the purposes of this chapter;
6 and

7 (f) Neither the applicant, any of its principals, or the designated
8 exchange facilitator officer have been found to be in violation of this
9 chapter or rules.

10 (2) If the designated exchange facilitator officer terminates
11 employment with the licensee, the licensee shall immediately notify the
12 director in writing of the termination of the exchange facilitator
13 officer. The licensee shall also immediately inform the director in
14 writing of any newly designated exchange facilitator officer for the
15 licensee, setting forth the experience, integrity, and competency of
16 the newly designated exchange facilitator officer in facilitating
17 exchange transactions, and shall provide any other information required
18 by the director, including current fingerprint cards for the exchange
19 facilitator officer.

20 (3) If the director does not find the conditions of subsection (1)
21 of this section have been met, the director shall not issue the
22 license. The director shall notify the applicant of the denial and
23 return to the applicant the bond or approved alternative.

24 (4) A license issued under this section expires on the date one
25 year from the date of issuance which, for license renewal purposes, is
26 also the renewal date. The director shall adopt rules establishing the
27 process for renewal of licenses.

28 (5) A licensee may surrender a license by delivering to the
29 director written notice of surrender, but the surrender does not affect
30 the licensee's civil or criminal liability or any administrative
31 actions arising from acts or omissions occurring before such surrender.

32 (6) To prevent undue delay in the issuance of a license, an interim
33 license with a fixed date of expiration may be issued when the director
34 determines that the exchange facilitator has substantially fulfilled
35 the requirements for licensing as defined by rule.

36 NEW SECTION. **Sec. 7.** (1) A licensee shall file with the director
37 within thirty business days any material changes in information

1 provided in a licensee's application as prescribed in rule by the
2 director. If this information indicates that the licensee is no longer
3 in compliance with this chapter, the director may take any action
4 authorized under this chapter to ensure that the licensee operates in
5 compliance with this chapter.

6 (2) A licensee shall file a report with the director within one
7 business day after the licensee has reason to know of the occurrence of
8 any of the following events:

9 (a) The filing of a petition by or against the licensee, or any
10 authorized delegate of the licensee, under the United States bankruptcy
11 code (11 U.S.C. Sec. 101-110) for bankruptcy or reorganization;

12 (b) The filing of a petition by or against the licensee, or any
13 authorized delegate of the licensee, for receivership, the commencement
14 of any other judicial or administrative proceeding for its dissolution
15 or reorganization, or the making of a general assignment for the
16 benefit of its creditors;

17 (c) The commencement of a proceeding to revoke, suspend, restrict,
18 or condition its license, or otherwise discipline or sanction the
19 licensee, in a state or country in which the licensee engages in
20 business or is licensed;

21 (d) The cancellation or other impairment of the licensee's bond or
22 other security; or

23 (e) A felony charge or felony conviction of an officer, director,
24 principal, or the designated exchange facilitator officer.

25 NEW SECTION. **Sec. 8.** A licensee may apply to the director for
26 authority to establish one or more branch offices under the same or
27 different name as the main office. Provided that the applicant is in
28 good standing with the department, as defined in rule by the director,
29 the director shall promptly issue a duplicate license for each of the
30 branch offices showing the location of the main office and the
31 particular branch. Each duplicate license shall be prominently
32 displayed in the office for which it is issued.

33 NEW SECTION. **Sec. 9.** (1) Every licensee under this chapter has
34 the responsibility to act as a custodian for all exchange funds,
35 including money, property, other consideration, or instruments received
36 by the licensee from, or on behalf of, the client, except funds

1 received as the licensee's compensation. Every licensee shall invest
2 exchange funds in investments that meet a prudent person standard and
3 satisfy investment goals of liquidity and preservation of principal.
4 For purposes of this section, a prudent person standard is violated if:

5 (a) Exchange funds are knowingly commingled by the exchange
6 facilitator with the operating accounts of the exchange facilitator;

7 (b) Exchange funds are loaned or otherwise transferred to any
8 related company or person or entity affiliated with or related to the
9 exchange facilitator except that this subsection (1)(b) does not apply
10 to a transfer or loan made to a financial institution that is the
11 parent of or related to the exchange facilitator; or

12 (c) Exchange funds are invested in a manner that does not provide
13 sufficient liquidity to meet the exchange facilitator's contractual
14 obligations to its clients or does not preserve the principal of the
15 exchange funds.

16 (2) A person who, without doing more, performs the act of an
17 exchange facilitator is not performing a trust service or acting as a
18 trustee for a taxpayer.

19 NEW SECTION. **Sec. 10.** A licensed exchange facilitator is liable
20 for any conduct violating this chapter by the designated exchange
21 facilitator officer or other person while employed or engaged by the
22 licensed exchange facilitator.

23 NEW SECTION. **Sec. 11.** (1) A license issued under this chapter
24 does not authorize any person other than the person to whom it is
25 issued to do any act by virtue thereof nor to operate in any other
26 manner than under his or her own name except:

27 (a) A licensed exchange facilitator may operate or advertise under
28 a name other than the one under which the license is issued by
29 obtaining the written consent of the director to do so; and

30 (b) An exchange facilitator may establish one or more branch
31 offices under a name or names different from that of the main office if
32 the name or names are approved by the director, so long as each branch
33 office is clearly identified as a branch or division of the main
34 office. Both the name of the branch office and of the main office must
35 clearly appear on the sign identifying the office, if any, and in any

1 advertisement or on any letterhead of any stationery or any forms, or
2 signs used by the mortgage firm on which either the name of the main or
3 branch offices appears.

4 (2) Exchange funds are not subject to execution or attachment on
5 any claim against the exchange facilitator. An exchange facilitator
6 shall not knowingly keep or cause to be kept any money in any financial
7 institution under any name designating the money as being set aside for
8 the benefits of the clients of any exchange facilitator, unless the
9 money was actually entrusted to the exchange facilitator by the client.

10 NEW SECTION. **Sec. 12.** (1) An exchange facilitator shall use
11 consistent and accurate accounting procedures to account for exchange
12 funds. The director may adopt rules regarding trust fund accounting.

13 (2) Except as otherwise provided in subsection (3) of this section,
14 an exchange facilitator shall maintain accurate and current books and
15 records which must be readily available at a location available to the
16 director until at least twenty-five months have elapsed following the
17 effective period to which the books and records relate.

18 (3) Where the usual business location of an exchange facilitator is
19 outside the state of Washington, the exchange facilitator shall, as
20 determined by the director by rule, either maintain its books and
21 records at a location in this state, or reimburse the director for his
22 or her expenses, including but not limited to transportation, food, and
23 lodging expenses, relating to any examination or investigation
24 resulting under this chapter.

25 (4) "Books and records" includes but is not limited to:

26 (a) Copies of all advertisements placed by or at the request of the
27 exchange facilitator that mention rates or fees. In the case of radio
28 or television advertisements, or advertisements placed on a telephonic
29 information line or other electronic source of information including
30 but not limited to a computer database or electronic bulletin board, an
31 exchange facilitator shall keep copies of the precise script for the
32 advertisement. All advertisement records shall include for each
33 advertisement the date or dates of publication and name of each
34 periodical, broadcast station, or telephone information line which
35 published the advertisement or, in the case of a flyer or other
36 material distributed by the exchange facilitator, the dates, methods,
37 and areas of distribution; and

1 (b) Copies of all documents, notes, computer records if not stored
2 in printed form, correspondence, or memoranda relating to a person from
3 whom the exchange facilitator has accepted a deposit or other funds, or
4 accepted property, or with whom the exchange facilitator has entered
5 into an agreement to assist in facilitating an exchange.

6 NEW SECTION. **Sec. 13.** (1) For the purpose of discovering
7 violations of this chapter or securing information lawfully required
8 under this chapter, the director may at any time, either personally or
9 by designees, investigate or examine the exchanges and business and,
10 wherever located, the books, accounts, records, papers, documents,
11 files, and other information used in the business of every licensee and
12 of every person who is engaged in the business of facilitating
13 exchanges under this chapter, whether the person acts or claims to act
14 as principal or agent, or under or without the authority of this
15 chapter. For these purposes, the director or designated
16 representatives shall have free access to the offices and places of
17 business, books, accounts, papers, documents, other information,
18 records, files, safes, and vaults of such a person. The director or
19 persons designated by the director may require the attendance of and
20 examine under oath all persons whose testimony may be required about
21 the loans or the business or the subject matter of any investigation,
22 examination, or hearing and may require such a person to produce books,
23 accounts, papers, records, files, and any other information the
24 director or designated persons deem relevant to the inquiry. The
25 director may require the production of original books, accounts,
26 papers, records, files, and other information; may require that the
27 original books, accounts, papers, records, files, and other information
28 be copied; or may make copies himself or herself or by designee of the
29 original books, accounts, papers, records, files, or other information.
30 If a licensee or person does not attend and testify, or does not
31 produce the requested books, accounts, papers, records, files, or other
32 information, then the director or designated representatives may issue
33 a subpoena or subpoena duces tecum requiring attendance or compelling
34 production of the books, accounts, papers, records, files, or other
35 information.

36 (2) The director shall make periodic examinations of the affairs,
37 business, office, and records of each licensee as determined by rule.

1 (3) Every licensee examined or investigated by the director or the
2 director's designee shall pay to the director the cost of the
3 examination or investigation of each licensed place of business as
4 determined by rule by the director.

5 (4) The director may enter into cooperative and reciprocal
6 agreements with the appropriate financial regulatory authorities of the
7 United States, any state, the District of Columbia, or any trust
8 territory of the United States for the periodic examination of exchange
9 facilitators and their subsidiaries or holding companies in other
10 states, the District of Columbia, or trust territories. The director
11 may accept reports of examination and other records from such
12 authorities in lieu of conducting his or her own examinations. The
13 director may enter into joint actions with other regulatory bodies
14 having concurrent jurisdiction or may enter into such actions
15 independently to carry out his or her responsibilities under this
16 chapter and assure compliance with the laws of this state.

17 (5) As a part of the examination process, a licensee shall provide
18 the director with an annual report of exchange facilitator activity.
19 The director may by rule create a schedule and format for the annual
20 report. The annual report may only include the following for exchange
21 facilitator activities in Washington state:

22 (a) The total number of property exchanges facilitated by the
23 licensee; and

24 (b) The total dollar volume of property exchanges facilitated by
25 the licensee.

26 Any information provided by an exchange facilitator in an annual
27 report that constitutes a trade secret as defined in RCW 19.108.010 is
28 exempt from the disclosure requirements in chapters 42.17 and 42.56
29 RCW, unless aggregated with information supplied by other exchange
30 facilitators in such a manner that the individual information of an
31 exchange facilitator is not identifiable.

32 (6) Financial information, business plans, examination reports, and
33 any information produced or obtained in examining an exchange
34 facilitator under this chapter is exempt from disclosure as provided in
35 RCW 42.56.270.

36 NEW SECTION. **Sec. 14.** It is a violation of this chapter for a

1 person required to be licensed under this chapter as an exchange
2 facilitator to:

3 (1) Directly or indirectly employ any scheme, device, or artifice
4 to defraud or mislead any person;

5 (2) Engage in any unfair or deceptive practice toward any person;

6 (3) Obtain property by fraud or misrepresentation;

7 (4) Fail to account for any moneys or property belonging to others
8 that may be in the possession or under the control of the licensee;

9 (5) Fail to fulfill its contractual duties to the taxpayer to
10 deliver property or funds to the taxpayer in a material way unless such
11 a failure is due to circumstances beyond the control of the licensee;

12 (6) Fail to make disclosures required by any applicable state or
13 federal law;

14 (7) Make, in any manner, any false or deceptive statement or
15 representation;

16 (8) Negligently make any false statement or knowingly and willfully
17 make any omission of material fact in connection with any reports filed
18 by an exchange facilitator or in connection with any investigation
19 conducted by the department;

20 (9) Commit, in the case of an entity, including commission by its
21 owners, officers, directors, employees, agents, or independent
22 contractors, any crime involving fraud, misrepresentation, deceit,
23 embezzlement, misappropriation of funds, robbery, or other theft of
24 property;

25 (10) Knowingly commingle funds held for a taxpayer in any account
26 which holds the licensee's own funds;

27 (11) Fail to get a license as required by this chapter;

28 (12) Fail to comply with a final order issued by the director; or

29 (13) Fail to comply with this chapter or any rule adopted under
30 this chapter.

31 NEW SECTION. **Sec. 15.** (1) The director may enforce all laws and
32 rules relating to the licensing of exchange facilitators, grant or deny
33 licenses to exchange facilitators, and hold hearings.

34 (2) The director may impose fines or order restitution against
35 licensees or other persons subject to this chapter, or deny, suspend,
36 decline to renew, or revoke licenses for:

37 (a) Violations of orders, including cease and desist orders;

1 (b) False statements or omission of material information on the
2 application that, if known, would have allowed the director to deny the
3 application for the original license;

4 (c) Failure to maintain the required insurance or maintain the
5 required bond;

6 (d) Failure to comply with any directive, order, or subpoena of the
7 director; or

8 (e) Any violation of this chapter.

9 (3) The director may impose fines on an employee, independent
10 contractor, or agent of the licensee, or other person subject to this
11 chapter for:

12 (a) Any violations of this chapter; or

13 (b) Failure to comply with any directive or order of the director.

14 (4) The director may issue orders directing a licensee, its
15 employee, independent contractor, agent, or other person subject to
16 this chapter to cease and desist from conducting business.

17 (5) The director may issue orders removing from office or
18 prohibiting from participation in the conduct of the affairs of a
19 licensed exchange facilitator, any officer, principal, designated
20 exchange facilitator officer, employee of any licensed exchange
21 facilitator or any person subject to licensing under this chapter for:

22 (a) Any violation of this chapter;

23 (b) False statements or omission of material information on the
24 application that, if known, would have allowed the director to deny the
25 application for the original license;

26 (c) Conviction of a gross misdemeanor involving dishonesty or
27 financial misconduct or a felony after obtaining a license; or

28 (d) Failure to comply with any directive or order of the director.

29 (6) Each day's continuance of a violation or failure to comply with
30 any directive or order of the director is a separate and distinct
31 violation or failure.

32 (7)(a) The director may adopt reciprocity standards for licensure
33 of applicants licensed in other jurisdictions that meet the following
34 requirements:

35 (i) The applicant is licensed in a jurisdiction that grants
36 reciprocal licensing to exchange facilitators licensed in this state;

37 (ii) The reciprocal jurisdiction has requirements for licensing

1 that are equal to or greater than the requirements set forth in this
2 chapter;

3 (iii) The applicant provides evidence to the director of the
4 financial security requirements in section 4 of this act;

5 (iv) The applicant has designated the director as its
6 representative to receive service of process for matters arising in
7 this state;

8 (v) The applicant does not maintain an office in this state in
9 connection with the conduct of an exchange facilitator.

10 (b) The director shall undertake necessary and sufficient measures
11 to identify reciprocal jurisdictions as they meet the reciprocity
12 standards in (a)(i) and (ii) of this subsection. From time to time,
13 the director shall publish a list of those reciprocal jurisdictions.

14 (c) Each reciprocal license under this section may be renewed
15 annually if:

16 (i) The applicant remains licensed in good standing in the
17 reciprocal jurisdiction; and

18 (ii) The reciprocal jurisdiction continues to meet the reciprocity
19 standards in (a)(i) and (ii) of this subsection.

20 (8) The director shall immediately suspend the license or
21 certificate of a person who has been certified under RCW 74.20A.320 by
22 the department of social and health services as a person who is not in
23 compliance with a support order. If the person has continued to meet
24 all other requirements for reinstatement during the suspension,
25 reissuance of the license or certificate shall be automatic upon the
26 director's receipt of a release issued by the department of social and
27 health services stating that the licensee is in compliance with the
28 order.

29 (9) In the event that the director suspends or revokes the license
30 of a licensee, the director may appoint a receiver licensee or
31 successor licensee for the purpose of winding up and completing the
32 existing exchanges but that receiver licensee or successor licensee
33 does not have the authority to accept any new business as an exchange
34 facilitator.

35 NEW SECTION. **Sec. 16.** The director may, at his or her discretion
36 and as provided for in section 15 of this act, take any action
37 specified in this chapter. If the person subject to such an action

1 does not appear in person or by counsel at the time and place
2 designated for any administrative hearing that may be held on the
3 action then the person has consented to the action. If the person
4 subject to the action consents, or if after hearing the director finds
5 by a preponderance of the evidence that any grounds for sanctions under
6 this chapter exist, then the director may impose any sanction
7 authorized by this chapter.

8 NEW SECTION. **Sec. 17.** A person that intentionally violates
9 section 14 (1) through (5) and (9) through (12) of this act is guilty
10 of a class B felony under chapter 9A.20 RCW.

11 NEW SECTION. **Sec. 18.** The administrative procedure act, chapter
12 34.05 RCW, governs the processes and the proceedings for:

- 13 (1) Denying license applications;
- 14 (2) Suspending or revoking licenses;
- 15 (3) Issuing cease and desist orders;
- 16 (4) Imposing civil penalties or other remedies issued under this
17 chapter;
- 18 (5) Any appeal or review of an action; and
- 19 (6) Rule making.

20 NEW SECTION. **Sec. 19.** (1) The director may make necessary public
21 or private investigations within or outside of this state to:

22 (a) Determine whether any person has violated or is about to
23 violate this chapter or any rule or order under this chapter, or to aid
24 in the enforcement of this chapter or in the prescribing of rules and
25 forms under this chapter; or

26 (b) Require or permit any person to file a statement in writing,
27 under oath or otherwise as the director determines, as to all facts and
28 circumstances concerning the matter to be investigated.

29 (2) For the purpose of any investigation or proceeding under this
30 chapter, the director or any officer designated by the director may
31 administer oaths or affirmations, and upon his or her own motion or
32 upon request of any party, may subpoena witnesses, compel their
33 attendance, take evidence, and require the production of any matter
34 which is relevant to the investigation, including the existence,
35 description, nature, custody, condition, and location of any books,

1 documents, or other tangible things and the identity and location of
2 persons having knowledge or relevant facts, or any other matter
3 reasonably calculated to lead to the discovery of material evidence.

4 (3) Upon failure to obey a subpoena or to answer questions
5 propounded by the investigating officer and upon reasonable notice to
6 all persons affected thereby, the director may apply to the superior
7 court for an order compelling compliance.

8 NEW SECTION. **Sec. 20.** Whenever the director determines that the
9 public is likely to be substantially injured by delay in issuing a
10 cease and desist order, the director may immediately issue a temporary
11 cease and desist order. The order shall become effective at the time
12 specified in the order. Every temporary cease and desist order shall
13 include a provision that a hearing will be held, within fourteen days
14 unless otherwise specified in chapter 34.05 RCW, upon request to
15 determine whether the order will become permanent.

16 If it appears that a person has engaged in an act or practice
17 constituting a violation of this chapter, or a rule or order under this
18 chapter, the director, with or without prior administrative
19 proceedings, may bring an action in the superior court to enjoin the
20 acts or practices and to enforce compliance with this chapter or any
21 rule or order under this chapter. Upon proper showing, injunctive
22 relief or temporary restraining orders shall be granted. The director
23 shall not be required to post a bond in any court proceedings.

24 NEW SECTION. **Sec. 21.** Every licensed exchange facilitator that
25 does not maintain a physical office within the state must maintain a
26 registered agent within the state to receive service of any lawful
27 process in any judicial or administrative noncriminal suit, action, or
28 proceeding against the licensed exchange facilitator which arises under
29 this chapter or any rule or order under this chapter, with the same
30 force and validity as if served personally on the licensed exchange
31 facilitator. Service upon the registered agent is not effective unless
32 the plaintiff, who may be the director in a suit, action, or proceeding
33 instituted by him or her, no later than the next business day sends
34 notice of the service and a copy of the process by registered mail to
35 the defendant or respondent at the last address of the respondent or
36 defendant on file with the director. In any judicial action, suit, or

1 proceeding arising under this chapter or any rule or order adopted
2 under this chapter between the department or director and a licensed
3 exchange facilitator who does not maintain a physical office in this
4 state, venue is exclusively in the superior court of Thurston county.

5 NEW SECTION. **Sec. 22.** The legislature finds that the practices in
6 section 14 of this act are matters vitally affecting the public
7 interest for the purpose of applying the consumer protection act,
8 chapter 19.86 RCW. Any violation of section 14 (1) through (12) of
9 this act is not reasonable in relation to the development and
10 preservation of business and is an unfair or deceptive act or practice
11 and unfair method of competition in the conduct of trade or commerce in
12 violation of RCW 19.86.020. Remedies provided by chapter 19.86 RCW are
13 cumulative and not exclusive.

14 NEW SECTION. **Sec. 23.** (1) There is established an exchange
15 facilitator commission of the state of Washington, to consist of the
16 director or his or her designee as chair, and five other members who
17 shall act as advisors to the director as to the needs of the exchange
18 facilitator profession, including but not limited to the design and
19 conduct of tests to be administered to applicants, educational
20 programs, audits and investigations of the profession designed to
21 protect the consumer, and any other matters determined appropriate.

22 (2) The director shall appoint the other members, each of whom has
23 been a resident of this state for at least five years and has at least
24 five years' experience as an exchange facilitator.

25 (3) The members of the first commission shall serve for the
26 following terms: One member for one year, one member for two years,
27 one member for three years, one member for four years, and one member
28 for five years, from the date of their appointment, or until their
29 successors are duly appointed and qualified. Every member of the
30 commission shall receive a certificate of appointment from the director
31 and before beginning the member's term of office shall file with the
32 secretary of state a written oath or affirmation for the faithful
33 discharge of the member's official duties. On the expiration of the
34 term of each member, the director shall appoint a successor to serve
35 for a term of five years or until the member's successor has been
36 appointed and qualified.

1 (4) The director may remove any member of the commission for cause.
2 Vacancies in the commission for any reason shall be filled by
3 appointment for the unexpired term.

4 (5) Members shall be compensated in accordance with RCW 43.03.240,
5 and shall be reimbursed for their travel expenses incurred in carrying
6 out the provisions of this chapter in accordance with RCW 43.03.050 and
7 43.03.060.

8 NEW SECTION. **Sec. 24.** If the federal government changes a federal
9 rule or statute cited in this chapter, the director may determine if a
10 successor section has been adopted by federal law or rule for the
11 purposes of this chapter. The director is urged to pursue correcting
12 legislation for the citation at a time when that is expedient and
13 appropriate.

14 NEW SECTION. **Sec. 25.** The director may adopt rules to implement
15 and administer this chapter.

16 NEW SECTION. **Sec. 26.** The director of the department of financial
17 institutions or the director's designee may take such steps as are
18 necessary to ensure this act is implemented on January 1, 2009.

19 **Sec. 27.** RCW 42.56.270 and 2007 c 470 s 2, 2007 c 251 s 13, and
20 2007 c 197 s 4 are each amended to read as follows:

21 The following financial, commercial, and proprietary information is
22 exempt from disclosure under this chapter:

23 (1) Valuable formulae, designs, drawings, computer source code or
24 object code, and research data obtained by any agency within five years
25 of the request for disclosure when disclosure would produce private
26 gain and public loss;

27 (2) Financial information supplied by or on behalf of a person,
28 firm, or corporation for the purpose of qualifying to submit a bid or
29 proposal for (a) a ferry system construction or repair contract as
30 required by RCW 47.60.680 through 47.60.750 or (b) highway construction
31 or improvement as required by RCW 47.28.070;

32 (3) Financial and commercial information and records supplied by
33 private persons pertaining to export services provided under chapters

1 43.163 and 53.31 RCW, and by persons pertaining to export projects
2 under RCW 43.23.035;

3 (4) Financial and commercial information and records supplied by
4 businesses or individuals during application for loans or program
5 services provided by chapters (~~(15-110)~~) 43.325, 43.163, 43.160,
6 43.330, and 43.168 RCW, or during application for economic development
7 loans or program services provided by any local agency;

8 (5) Financial information, business plans, examination reports, and
9 any information produced or obtained in evaluating or examining a
10 business and industrial development corporation organized or seeking
11 certification under chapter 31.24 RCW;

12 (6) Financial information, business plans, examination reports, and
13 any information produced or obtained in examining an exchange
14 facilitator under chapter 19.--- RCW (sections 1 through 25, 28, 29,
15 and 31 of this act);

16 (7) Financial and commercial information supplied to the state
17 investment board by any person when the information relates to the
18 investment of public trust or retirement funds and when disclosure
19 would result in loss to such funds or in private loss to the providers
20 of this information;

21 (~~(7)~~) (8) Financial and valuable trade information under RCW
22 51.36.120;

23 (~~(8)~~) (9) Financial, commercial, operations, and technical and
24 research information and data submitted to or obtained by the clean
25 Washington center in applications for, or delivery of, program services
26 under chapter 70.95H RCW;

27 (~~(9)~~) (10) Financial and commercial information requested by the
28 public stadium authority from any person or organization that leases or
29 uses the stadium and exhibition center as defined in RCW 36.102.010;

30 (~~(10)~~) (11)(a) Financial information, including but not limited
31 to account numbers and values, and other identification numbers
32 supplied by or on behalf of a person, firm, corporation, limited
33 liability company, partnership, or other entity related to an
34 application for a horse racing license submitted pursuant to RCW
35 67.16.260(1)(b), liquor license, gambling license, or lottery retail
36 license;

37 (b) Independent auditors' reports and financial statements of

1 house-banked social card game licensees required by the gambling
2 commission pursuant to rules adopted under chapter 9.46 RCW;

3 ~~((+11+))~~ (12) Proprietary data, trade secrets, or other information
4 that relates to: (a) A vendor's unique methods of conducting business;
5 (b) data unique to the product or services of the vendor; or (c)
6 determining prices or rates to be charged for services, submitted by
7 any vendor to the department of social and health services for purposes
8 of the development, acquisition, or implementation of state purchased
9 health care as defined in RCW 41.05.011;

10 ~~((+12+))~~ (13)(a) When supplied to and in the records of the
11 department of community, trade, and economic development:

12 (i) Financial and proprietary information collected from any person
13 and provided to the department of community, trade, and economic
14 development pursuant to RCW 43.330.050(8) (~~and 43.330.080(4)~~); and

15 (ii) Financial or proprietary information collected from any person
16 and provided to the department of community, trade, and economic
17 development or the office of the governor in connection with the
18 siting, recruitment, expansion, retention, or relocation of that
19 person's business and until a siting decision is made, identifying
20 information of any person supplying information under this subsection
21 and the locations being considered for siting, relocation, or expansion
22 of a business;

23 (b) When developed by the department of community, trade, and
24 economic development based on information as described in (a)(i) of
25 this subsection, any work product is not exempt from disclosure;

26 (c) For the purposes of this subsection, "siting decision" means
27 the decision to acquire or not to acquire a site;

28 (d) If there is no written contact for a period of sixty days to
29 the department of community, trade, and economic development from a
30 person connected with siting, recruitment, expansion, retention, or
31 relocation of that person's business, information described in (a)(ii)
32 of this subsection will be available to the public under this chapter;

33 ~~((+13+))~~ (14) Financial and proprietary information submitted to or
34 obtained by the department of ecology or the authority created under
35 chapter 70.95N RCW to implement chapter 70.95N RCW;

36 ~~((+14+))~~ (15) Financial, commercial, operations, and technical and
37 research information and data submitted to or obtained by the life
38 sciences discovery fund authority in applications for, or delivery of,

1 grants under chapter 43.350 RCW, to the extent that such information,
2 if revealed, would reasonably be expected to result in private loss to
3 the providers of this information;

4 ~~((15))~~ (16) Financial and commercial information provided as
5 evidence to the department of licensing as required by RCW 19.112.110
6 or 19.112.120, except information disclosed in aggregate form that does
7 not permit the identification of information related to individual fuel
8 licensees;

9 ~~((16))~~ (17) Any production records, mineral assessments, and
10 trade secrets submitted by a permit holder, mine operator, or landowner
11 to the department of natural resources under RCW 78.44.085;

12 ~~((17))~~ (18)(a) Farm plans developed by conservation districts,
13 unless permission to release the farm plan is granted by the landowner
14 or operator who requested the plan, or the farm plan is used for the
15 application or issuance of a permit;

16 (b) Farm plans developed under chapter 90.48 RCW and not under the
17 federal clean water act, 33 U.S.C. Sec. 1251 et seq., are subject to
18 RCW 42.56.610 and 90.64.190;

19 ~~((18))~~ (19) Financial, commercial, operations, and technical and
20 research information and data submitted to or obtained by a health
21 sciences and services authority in applications for, or delivery of,
22 grants under RCW 35.104.010 through 35.104.060, to the extent that such
23 information, if revealed, would reasonably be expected to result in
24 private loss to providers of this information; and

25 ~~((19))~~ (20) Information gathered under chapter 19.85 RCW or RCW
26 34.05.328 that can be identified to a particular business.

27 NEW SECTION. **Sec. 28.** If any provision of this act or its
28 application to any person or circumstance is held invalid, the
29 remainder of the act or the application of the provision to other
30 persons or circumstances is not affected.

31 NEW SECTION. **Sec. 29.** This act may be known and cited as the
32 exchange facilitator act.

33 NEW SECTION. **Sec. 30.** Sections 1 through 25, 28, 29, and 31 of

1 this act constitute a new chapter in Title 19 RCW.

2 NEW SECTION. **Sec. 31.** This act takes effect January 1, 2009.

--- END ---